

E-FILED 02-23-2011

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

KELLI COMBS, an individual,

No. C10-01120 HRL

Plaintiff,

**ORDER THAT CASE BE REASSIGNED
TO A DISTRICT COURT JUDGE**

v.

REPORT AND RECOMMENDATION

JOHN DOE, an individual; JANE DOE, an
individual; JAMES DIAZ, an individual; and
LUIS CINTRON, an individual,

[Re: Docket No. 24]

Defendants.

BACKGROUND

Plaintiff Kelli Combs (“Combs”) is a court reporter who claims to be the rightful owner of “www.CSRNation.com” (“the Website”) and the following five domain names: (a) CSRnation.com; (b) CSRnation.net; (c) CSRnation.org; (d) CSRnation.us; and (e) CSRnation.biz (“the Domain Names”). (Docket No. 27, Combs Decl. ¶ 2). According to Combs, the Website was established in January 2008 and had been growing in popularity as a social network enabling court reporters to collaborate, network and locate projects. (*Id.* ¶¶ 2, 4). In sum, plaintiff claims that defendant James Diaz¹ stole her Domain Names and deleted the Website. Specifically, Combs alleges that Diaz hacked into her email account and fraudulently obtained a new password, which enabled him to

¹ As explained below, Diaz’s true identity is unknown; and, there is some question whether he is, in fact, one and the same person as defendant “Luis Cintron.” (*See, e.g.,* Complaint ¶5). For simplicity, this court will refer to defendant as “Diaz” here.

1 transfer the Domain Names and to delete the Website. She sues for conversion; violation
2 of the Computer Fraud and Abuse Act (18 U.S.C. § 1030, et seq.); violation of the
3 Electronic Communications Privacy Act (18 U.S.C. § 2701 et seq.), violation of California
4 Penal Code § 502; and for declaratory relief. In her complaint, Combs also requests “such
5 other injunctive relief as Combs may request and the Court may deem just and proper.”
6 (Docket No. 1, Complaint at 9).

7 Plaintiff took some pains to discover Diaz’s true identity. However, all of the
8 contact information she obtained turned out to be fake. (See, e.g., Docket Nos. 8-9).
9 Combs was given leave to effect service by publication. (Docket No. 14). She says that
10 she did so. Diaz did not respond. Nor has he appeared in this action. Default was entered
11 against him on December 22, 2010. (Docket No. 20).

12 Now before the court is Combs’ motion for default judgment. The matter is
13 deemed suitable for determination without oral argument, and the March 1, 2011 hearing
14 is vacated. Civ. L.R. 7-1(b). For the reasons stated below, this court recommends that
15 plaintiff’s motion for entry of judgment be granted in part.

16 LEGAL STANDARD

17 After entry of default, courts may, in their discretion, enter default judgment. See
18 FED. R. CIV. P. 55; Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir. 1980). In deciding
19 whether to enter default judgment, a court may consider the following factors: (1) the
20 possibility of prejudice to the plaintiff; (2) the merits of the plaintiff’s substantive claim;
21 (3) the sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the
22 possibility of a dispute concerning material facts; (6) whether the default was due to
23 excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil
24 Procedure favoring decisions on the merits. Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th
25 Cir. 1986). In considering these factors, all factual allegations in the plaintiff’s complaint
26 are taken as true, except those relating to damages. TeleVideo Sys., Inc. v. Heidenthal,
27 826 F.2d 915, 917-18 (9th Cir. 1987). When the damages claimed are not readily
28 ascertainable from the pleadings and the record, the court may conduct a hearing to

conduct an accounting, determine the amount of damages, establish the truth of any allegation by evidence, or investigate any other matter. FED. R. CIV. P. 55(b)(2).

DISCUSSION

A. Default Judgment

All of the Eitel factors favor entry of default judgment here. Plaintiff's claims have merit and are sufficiently pled. Combs says that she presently is seeking only a portion of the total damages to which she believes she is entitled. And, because all liability-related allegations are deemed true, there is no possibility of a dispute as to material facts. Moreover, Diaz has failed to appear or present a defense in this matter; and, there is no indication that his default was due to excusable neglect. While the court prefers to decide matters on the merits, Diaz's failure to participate in this litigation makes that impossible. A default judgment against Diaz appears to be Combs' only recourse.

B. Damages and Attorney's Fees

Combs seeks \$35,000, which sum includes plaintiff's claimed actual damages for the conversion of the Website and Domain Names, as well as attorney's fees.²

Under California law, an internet domain name is property that can serve as the basis for a registrant's conversion claim. Kremen v. Cohen, 337 F.3d 1024, 1030 (9th Cir. 2003). "To establish that tort, a plaintiff must show 'ownership or right to possession of property, wrongful disposition of the property right and damages.'" Id. at 1029 (quoting G.S. Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc., 958 F.2d 896, 906 (9th Cir. 1992)). "Conversion is a strict liability tort." Mendoza v. Rast Produce Co., Inc., 140 Cal. App.4th 1395, 1405, 45 Cal.Rptr.3d 525 (2006). "The measure of damages for a conversion claim is presumed to be the amount equal to the value of the property at the time of conversion and an amount sufficient to compensate plaintiff for the pursuit of the property." Express Media Group, LLC v. Express Corp., No. C06-03504, 2007 WL

² Combs purports to reserve her rights to seek any other remedies to which she may be entitled under the other claims for relief asserted in her complaint. She cites no authority for seeking judgment in such piecemeal fashion. Suffice to say that this Report and Recommendation concerns only the relief that Combs seeks in connection with her claim for conversion.

1 1394163 *4 (N.D. Cal., May 10, 2007) (Alsup, J.) (citing Cal. Civ. Code § 3336)). Lost
2 profits associated with the conversion may also be included. See Mendoza, 140 Cal.
3 App.4th at 1405.

4 Here, Combs' allegations are taken as true and show that she is the rightful owner
5 of the Website and Domain Names, which Diaz stole by hacking into her email account.
6 In her declaration, Combs accounts for her claimed expenses and lost profits suffered as a
7 result of defendant's conversion. The expenses incurred—i.e., \$7,500 for Website design,
8 \$4,500 in advertising, \$500 for purchase and registration of the Domain Names—all
9 appear to be reasonable. Combs Decl. ¶ 4. Additionally, given the number of users, both
10 in volume and in their frequency of visitation to the Website, coupled with Combs' plans
11 to begin charging a \$50 annual registration fee, the \$7,500 in lost profits appears
12 reasonable as well. Id. Accordingly, Combs should be awarded \$20,000 in actual
13 damages.

14 Combs also seeks \$15,000 in attorneys' fees. Under the "bedrock principle
15 known as the 'American Rule,'" however, "[e]ach litigant pays its own attorney's fees,
16 win or lose, unless a statute or contract provides otherwise." Hardt v. Reliance Standard
17 Life Ins. Co., 130 S. Ct. 2149, 2157 (2010). Combs fails to cite any authority for a fees
18 award in her motion. Nor does she cite any authority for the proposition that fees properly
19 may be awarded as part of her claimed actual damages for conversion. While paragraphs
20 37 and 44 of her complaint indicate that fees are available under the Electronic
21 Communications Privacy Act, *see* 18 U.S.C. § 2520(b)(3), and the California Penal Code,
22 *see* § 502(e)(2), Combs says that she is not presently seeking relief under either one of
23 those claims. Moreover, Combs has not submitted any declaration(s) identifying the
24 pertinent attorney billing rate(s), much less explaining why the time spent and rate(s)
25 charged are reasonable given the nature of the work performed. Accordingly, her request
26 for fees should be denied.

1 C. Declaratory Relief

2 Combs seeks a declaration that she is the rightful owner of the Website and
3 Domain Names. As discussed above, all of Combs' factual allegations are deemed true.
4 And, because the host companies require a court order identifying the rightful owner of
5 the Website and Domain Names, declaratory relief is proper and necessary.

6 D. Injunctive Relief

7 Plaintiff also requests an order (a) requiring Diaz to immediately deliver to her (or
8 her agent or representative), possession of, access to, and control over the Website and
9 Domain Names; and (b) enjoining Diaz (or any other defendant) from accessing or
10 tampering with any of her accounts, including those related to her e-mail, the Domain
11 Names, and the Website. As discussed above, all of Combs' factual allegations are
12 deemed true. In light of defendants' failure to appear in his action or relinquish control
13 over the accounts, this court finds that a permanent injunction is appropriate. Further, the
14 registrar should be authorized to transfer the Website and Domain Names to plaintiff, at
15 plaintiff's request and upon providing a copy of the order, whether or not defendant has
16 authorized the transfer. See, e.g., Ringcentral, Inc. v. Quimby, 711 F. Supp.2d 1048, 1051
17 (N.D. Cal. 2010).

18 **CONCLUSION**

19 Because not all parties have consented to the undersigned's jurisdiction, this court
20 ORDERS the Clerk of Court to reassign this case to a District Court Judge. The
21 undersigned further RECOMMENDS that the newly-assigned judge:


- 22 1. Declare Combs to be the sole owner of the Website and the Domain Names.
- 23 2. Order defendant to immediately transfer to Combs, or her agent or
24 representative, possession of, access to, and control over the Website and Domain Names.
25 Further, the registrar should be authorized to transfer these names to plaintiff, at plaintiff's
26 request and upon providing a copy of the court's order, whether or not defendant has
27 authorized the transfer.

1 3. Issue a permanent injunction enjoining defendant and each of his agents,
2 servants, employees and all other persons acting in concert or participation with him, from
3 (a) using, attempting to use, transferring, selling, or otherwise distributing, directly or
4 indirectly, any of the Domain Names; (b) accessing plaintiff's accounts with AOL, Ning,
5 GoDaddy, or any other internet service provider, web hosting platform, domain name
6 service provider, or other internet related business service provider; and (c) using,
7 attempting to use, accessing, attempting to access, altering, modifying, destroying, or in
8 any way tampering with the Website.

9 4. Award Combs \$20,000 in actual damages.

10 Any party may serve and file objections to this Report and Recommendation
11 within fourteen days after being served. FED. R. CIV. P. 72(b); 28 U.S.C. § 636(b)(1).

12 Dated: February 23, 2011

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16 HOWARD R. LLOYD
17 UNITED STATES MAGISTRATE JUDGE
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United States District Court

For the Northern District of California

1 5:10-cv-01120-HRL Notice has been electronically mailed to:

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